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No. 76-6258

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

TYREES COLOZA WHITEHEAD, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his conviction for aggravated bank robbery under 18 U.S.C. 2113(d) precludes a simultaneous conviction and consecutive sentence for using a firearm during the robbery, in violation of 18 U.S.C. 924(c)(1).[1/]

1/ 18 U.S.C. 2113 provides in pertinent part:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association;
>
> * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

18 U.S.C. 924(c) provides:

> Whoever--
>
> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States, shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or

(continued)

1. The judgment of the court of appeals was entered on January 21, 1977. The petition for a writ of certiorari was not filed until February 23, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court.

2. Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiring to commit bank robbery (Count One), aggravated bank robbery (Count Two), using a firearm during the commission of the robbery (Count Three), and of unlawfully carrying a firearm during the robbery (Count Four), in violation of 18 U.S.C. 371, 2113(d), 924(c)(1) and 924(c)(2).[2/] He was sentenced to consecutive terms of twenty years' imprisonment on Count Two and five years' imprisonment on Count Three.[3/] The court of appeals affirmed (Pet. App.).

The evidence, which is not here in dispute, showed that on January 6, 1975, the Shaefer Street Branch of the United Virginia Bank of Richmond, Virginia, was robbed by petitioner and two others at gunpoint. They took approximately $73,890 from the bank.

3. The issue here is whether Congress intended that a conviction under Section 2113(d) would bar an additional conviction and multiple punishment under Section 924(c)(1). The identical issue is presented in the petitions for a writ of certiorari in Michael Lee Simpson and Tommy Wayne Simpson v. United States, No. 76-5761, and Michael Lee Simpson v. United States, No. 76-5796,

1/ (continued)
> subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of the law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of the felony.

2/ The four-count indictment also charged five others with the commission of these offenses. Two co-indictees, Antonio Hicks and Robert Charles, pleaded guilty, and petitioner, Maurie Vaughan, Elijah Ivory, Joe Grant and Stanley Evans were tried jointly. Evans was acquitted by the jury. Vaughan and Grant were found guilty and received sentences identical to petitioner's. Their convictions were affirmed by the court of appeals. Grant has filed a petition for a writ of certiorari to this Court (No. 76-6463) raising issues not relevant here.

3/ The trial judge imposed no sentence on Count one or Count four.

certiorari granted, April 18, 1977.[4/] In the circumstances, it would be appropriate to defer disposition of this petition until the Court has decided Nos. 76-5761 and 76-5796.

Respectfully submitted.

WADE H. McCREE, JR.,
Solicitor General.

APRIL 1977.

4/ We did not oppose the grant of certiorari in Simpson, since the circuits are in conflict on the issue. Nevertheless, for the reasons stated in our memorandum acquiescing in the grant of certiorari there we submit that the court of appeals here correctly concluded that separate convictions and sentences are appropriate for violations of Sections 2113(d) and 924(c) committed in the course of the same bank robbery. We are sending a copy of our memorandum in Simpson to petitioner.